BRIEF IN SUPPORT OF THE PETITION

Opinions Below.

The opinion of Judge Dallinger of the United States Customs Court is reported as Reappraisement Decision No. 4580, United States Customs Court Reports, Vol. 2, pages 957-965 (R. 87-95). The opinion of the Third Division of the United States Customs Court is reported as Reappraisement Decision No. 4723, United States Customs Court Reports, Vol. 4, pages 622-627 (R. 100-106). The opinion of the United States Court of Customs and Patent Appeals is reported as Customs Appeal Decision 176, 29C. C. P. A. * * * It is printed as an appendix hereof.

Statement of the Case.

The principal facts pertinent to the single question involved are stated in the Petition, *ante*, pages 2 to 6.

Specification of Errors.

The United States Court of Customs and Patent Appeals erred:

(1) In finding and holding, as a matter of law, that the word "imported" as used in the clause "the price at which such or similar imported merchandise is freely offered for sale" in the definition of United States value requires that such or similar previously imported merchandise be offered from stock, physically available in the United States on the date of exportation of the merchandise being appraised, in order for United States value to exist;

(2) In finding and holding, as a matter of law, that since offers to sell such or similar imported machines in

the United States, at or prior to, the date of exportation herein were for machines imported thereafter, no statutory United States value existed for the involved merchandise;

(3) In not finding and holding, as a matter of law, that the use of the word "imported" in the clause "the price at which such or similar imported merchandise is freely offered for sale" in the definition of United States value, means that the selling price of imported, and not domestic, merchandise shall be the basis of such value;

(4) In reversing the judgment of the United States Customs Court.

Summary of Argument.

The points of argument follow the reason for granting the writ as set forth, *ante*, pages 6 to 7.

POINT I

The decision of the court below is apparently contrary to the intent of Congress.

In the enactment of the Tariff Act of 1930, as in the Tariff Act of 1922, the Congress provided alternative methods for the valuation of imported merchandise. Merchandise is first appraised at its foreign value or export value, whichever is higher. If neither of these values can be ascertained, United States value is used. Only if none of these three values can be ascertained is resort made to cost of production.

The statute defines these four methods of ascertaining the value or cost of imported merchandise, that is, of the imported merchandise to be appraised. United States value, which is here in question, is based upon the freely offered price of imported merchandise in this country. Congress originally contemplated using the freely offered

price in this country of either imported or domestic merchandise, which was such as or similar to that to be appraised. House of Representatives Report No. 7, 71st Congress, 1st Session, page 168. Senate Report No. 37, 71st Congress, 1st Session, pages 70-71. By a later Senate amendment the use of the domestic wholesale selling price of a comparable domestic article, as a basis for United States value, was eliminated, and the House receded. Senate Document No. 138, 71st Congress, 2nd Session, page 112, Amendment No. 1161.

It definitely appears from the foregoing that Congress wished United States value to be founded upon the price in the United States of such or similar imported merchandise, but not upon the price of domestic merchandise. Nowhere in the history of this legislation was there any indicated intent to require that the merchandise used as the basis of valuation be imported prior to, and on hand in the United States at, the date of exportation of the merchandise to be appraised.

Under earlier statutes, United States value was differently defined. Section 11 of the Act of June 10, 1890 as amended by Section 32 of the Act of July 24, 1897 (26 Stat. 136 as amended by 30 Stat. 211-213) provided in part:

> "It shall be lawful for appraising officers, in determining the dutiable value of such merchandise, to take into consideration the wholesale price at which such or similar merchandise is sold or offered for sale in the United States, due allowance being made for estimated duties thereon, the cost of transportation, insurance, and other necessary expenses from the place of shipment to the United States, and a reasonable commission, if any has been paid, not exceeding 6 per centum."

In the case of *Beer* v. *United States,* 1 Ct. Cust. Appls. 484, Treasury Decision 31526, the imported merchandise

had been appraised in accordance with this provision of the statute. The importer claimed that the language of the statute excluded the right of appraising officers to take into consideration the wholesale price at which the precise merchandise was sold. In overruling this contention, the United States Court of Customs Appeals said:

> "No better test, certainly no fairer test to the importer, could have been had as a basis of proceeding under this law than the wholesale price of the precise importation as sold by the importer himself, and that we deem within the very language of the statute authorizing the appraiser to take into consideration the wholesale price of 'such' merchandise."

A somewhat similar question was passed upon in the case of *United States* v. *Johnson Co.*, 9 Ct. Cust. Appls. 258, Treasury Decision 38215. Paragraph L, Section III, of the Tariff Act of 1913 (38 Stat. 185-186), provided a minimum value, in certain cases, of:

> "* * * the wholesale price at which such or similar imported merchandise is actually sold or freely offered for sale in usual wholesale quantities in the United States in the open market * * *"

less the appropriate deductions to reach a constructive foreign value. In construing this provision the court said, *inter alia:*

> "Inasmuch as the domestic sale price of 'such', the identical, merchandise is made evidence of the foreign market value in these cases, and 'such' never exists until the particular importation thereof is complete and sale made, the contention that only such domestic sales as were made *at the time of exportation* could be considered by appraising officers seems disposed of by the statute itself. The thing to be determined is 'market value' at the time of exportation, but in the absence of such Congress has prescribed how, with possibly later evidence only, appraising officers may *constructively* determine such market value."

When the Congress was considering the bill which became the Tariff Act of 1922, methods of valuation were fully discussed. The Committee on Ways and Means of the House of Representatives favored an American valuation system, based upon the wholesale selling price in the United States of comparable and competitive domestic products. When this bill, H. R. 7456, came to the Senate Committee on Finance, the opinions of that body were stated in Senate Report No. 595, 67th Congress, 2nd Session. At page 8 of this report appears the following:

> "Your committee, therefore, recommends that the value basis of existing law be continued and substituted for the American valuation plan embodied in the House bill. This basis for determining the value of imported merchandise includes the use of the export value of the merchandise in the country from which exported upon the date of exportation when it is higher than the foreign market value. Additional safeguards are recommended to further protect against undervaluation, and definitions have been phrased to require the ascertainment of values actually existing without recourse, except in extreme instances, to cost of production. For this purpose the definition of foreign market value has been amended so that where no foreign market value or export price exists in the country of exportation the price for dutiable purposes shall be the price of which such imported merchandise is sold in the United States less prescribed deductions."

Upon conference the House receded and the Senate amendment became part of the law.

The effect of the changes thus enacted into the Tariff Act of 1922 was to make United States value a mandatory value to be used before resorting to cost of production, rather than an advisory or a minimum value as in the previous acts. Furthermore, the word "sold" was omitted and the value based upon the price at which such or similar merchandise was "freely offered for sale". The definition

of United States value was reenacted without change in the Tariff Act of 1930.

The United States Court of Customs Appeals has held that "such" means the identical merchandise to be appraised. *United States* v. *Johnson Co., supra.* By its contruction of the definition of United States value in the case at bar, that court has written the word "such" out of the statute, since it has held that only previously imported merchandise, which may be "similar" but cannot be "such", can be used as the basis for determining United States value.

It is respectfully submitted that the natural and logical meaning of the statutory definition of United States value, and that which will effectuate the expressed intent of Congress not to resort to cost of production "except in extreme instances", is not that given to it by the Court of Customs and Patent Appeals. The true construction appears to be:

"The United States value of imported merchandise [that to be appraised] shall be the price at which such [the identical imported merchandise] or similar [in the event that such merchandise is not freely offered for sale to all purchasers] imported [but not domestic] merchandise is freely offered for sale [an offer may be for future goods], packed ready for delivery [merchandise may be offered in such condition although not presently so packed], in the principal market of the United States to all purchasers, at the time of exportation of the imported merchandise [that to be appraised], in the usual wholesale quantities and in the ordinary course of trade, * * *".

Imported merchandise can be freely offered for sale before its importation just as well as thereafter. To read into the statute the additional restriction that a stock of such or similar imported merchandise must be maintained in this country on the date of exportation of the merchandise to be valued is absolutely unwarranted.

POINT II

If the meaning given to the word "imported" by the court below is allowed to stand as correct, United States value, for all practical purposes, is deleted from the Tariff Act.

It is a matter of common knowledge that the importers of thousands of commodities for sale in this country at wholesale do not maintain stocks of these commodities. Few importers would normally take the risk of importing machinery, plant equipment, precision instruments or a multitude of other articles, storing them in a warehouse, and then hoping to find a purchaser for that particular article. Most importers do as was done in the instant case. The importer offered beer barrel washing machines of a certain type to possible purchasers for delivery in one month. A purchaser accepted such an offer. The importer ordered the machine from the foreign manufacturer and upon its arrival delivered it to his purchaser. Obviously the price at which he was freely offering such or similar machines at the date of exportation of the instant machine is an accurate measure of the value of such a machine in this country.

If, however, United States value is restricted to cases wherein stocks of imported merchandise are maintained in the United States for sale, such value will not exist in the vast majority of instances, contrary to the intent of Congress that United States value should be ascertainable in almost every case.

Furthermore, the confusion resulting from the decision of the court below will be enormous. Appraisers of merchandise at the ports throughout the country would have to check on hundreds, if not thousands, of commodities daily to ascertain whether someone had a stock of such or similar imported merchandise somewhere in the United States which was being freely offered for sale at the date

of exportation of the merchandise to be appraised. Importers, with much more limited sources of information, would be faced with a task actually impossible in many instances, and yet would be subject to the heavy statutory penalties if they improperly valued their merchandise upon entry.

As an example of uncertainty which would result from the decision of the court below, we note that one imported machine was on exhibition in New York for ten days before it was sold on October 4, 1934 (R. 30). According to that court, any such machines exported to the United States between September 24 and October 4, 1934 would be dutiable upon United States value, since this unsold imported machine was physically present in New York. But, following this theory, exportations after October 4, 1934 must revert to the cost of production method of valuation until another unsold machine was imported for stock.

If this interpretation is placed upon the word "imported" as used in the definition of United States value, the importer could select the more favorable basis of valuation—either United States value or cost of production—as he chose, by having a similar article available in stock on the date of exportation, or by maintaining no stock, or refusing to offer it, on the date of exportation. The basis of value for imported merchandise would change from day to day or from week to week. Such ephemeral bases of valuation are entirely illogical.

Of the two possible interpretations of the word "imported" as used in the definition of United States value, that should be adopted which expresses the intent of Congress and which makes the law reasonable and usable. That is, United States value should be based upon offers to sell such or similar imported merchandise, as contrasted with domestic merchandise, but it is immaterial whether or not the merchandise so offered was physically present in the United States at the date of exportation of the merchandise to be valued.

Conclusion.

The granting of a writ of certiorari in this case is appropriate since the construction of an important Federal statute is involved, since the construction placed upon it by the court below is contrary to the indicated intent of Congress, will result in great confusion for both Government appraising officers and for importers, and affects the rights of the majority of all importers.

WHEREFORE, it is respectfully prayed that a writ of certiorari issue.

Respectfully submitted,

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